No. 82-945

In the Supreme Court of the United States

OCTOBER TERM, 1983

SURE-TAN, INC. and SURAK LEATHER COMPANY,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTIONS PRESENTED

1. Whether, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, the employer constructively discharged employees known by the employer to be undocumented aliens by reporting the employees to the Immigration and Naturalization Service in retaliation for their engaging in union activity, thereby causing their arrest and immediate departure from the United States.

2. Whether the remedial order in this case is appropriate.

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STATEMENT

1. Petitioners are leather processing firms located in Chicago, Illinois. For purposes of the National Labor Relations Act ("NLRA"), they are a single, integrated employer. In July 1976, the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workmen of North America (the "Union") began to organize petitioners' employees. At that time, petitioners employed about 11 workers, most of whom were Mexican nationals present in the United States without visas or immigration papers authorizing them to work (Pet. App. 2a, 67a). In response to the organizing campaign, petitioners coercively interrogated employees about their union sentiments and activities and those of other employees, subjected them to profane verbal abuse, threatened that petitioners would reduce work opportunities if the employees voted for the Union, and promised more work if

they did not support the Union (Pet. App. 3a-6a, 69a-71a, 73a-74a). The Union prevailed in a Board election conducted on December 10, 1976 (Pet. App. 2a, 68a). *Sure-Tan, Inc. & Surak Leather Co.*, 231 N.L.R.B. 138 (1977), enforced, 583 F.2d 355 (7th Cir. 1978) (*"Sure-Tan I"*).

Two hours after the election, petitioners' president, John Surak, addressed a group of employees, including three of the undocumented aliens involved here. Surak told the employees that they were not his friends or "amigos," asked why they had voted for the Union, cursed them, and asked whether they had proper immigration papers. The employees replied that they and the other Mexican employees did not have such papers. Later that day, Surak threatened another employee that petitioners would go out of business as a result of the election (Pet. App. 4a, 70a).

Petitioners filed objections to the election on the ground, *inter alia*, that six of the seven eligible voters were undocumented aliens. *Sure-Tan I*, *supra*, 231 N.L.R.B. at 138-139. John Surak executed an affidavit on January 10, 1977 in connection with those objections in which he stated that he had been informed several months before the election that "these men were illegally here" (Pet. App. 11a, 72a n.3). In a decision dated January 17, 1977, the Acting Regional Director overruled petitioners' objections and certified the Union as the bargaining representative for petitioners' employees. Petitioners received notice of this decision on January 19, 1977.

On the next day, January 20, 1977, John Surak sent a letter to the Immigration and Naturalization Service ("INS") requesting that the INS check the status of a number of petitioners' employees and that INS give its attention to the matter "as soon as possible" (Pet. App. 8a-9a, 68a-69a). On February 18, 1977, as a result of Surak's letter, INS agents visited petitioners' plant, determined that five employees were in the United States in violation of the immigration laws, and arrested them (Pet. App. 9a, 69a, 75a). Each of the five employees exe-

cuted INS Form I-274, thereby acknowledging illegal presence in the United States and accepting INS's grant of voluntary departure in lieu of deportation (*id.* at 9a-10a). By the end of the day, the five employees had been placed on a bus bound for El Paso, Texas, from where they were to return to Mexico (Pet. App. 10a, 69a).

On March 29, 1977, petitioners sent letters in English by regular mail to the five employees at their last known addresses in Mexico offering to reinstate them, provided that doing so would "not subject Sure-Tan, Inc. to any violations of United States immigration laws." The letters further stated that the offer would remain open until May 1, 1977. There is no evidence that any of the letters was actually received (Pet. App. 20a, 80a).

2. Petitioners refused to bargain with the Union after it was certified as the bargaining representative. In unfair labor practice proceedings not involved here, the Board found that petitioners' refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). *Sure-Tan I*, *supra*, 231 N.L.R.B. at 140-141. The court of appeals enforced the Board's order, rejecting petitioners' contention that the certification and bargaining order were invalid because six of the seven employees eligible to vote in the election were aliens who were residing and working in the United States without authorization and who had since departed. *NLRB* v. *Sure-Tan, Inc.*, 583 F.2d 355 (7th Cir. 1978). The court observed that the term "employee" is defined broadly in Section 2(3) of the Act, 29 U.S.C. 152(3), and that the Board's interpretation of the term to include undocumented aliens is entitled to great weight and should be followed where, as here, there are no compelling indications that it is wrong. 583 F.2d at 358-359.

The court also held that the certification and bargaining order did not conflict with the Immigration and Nationality Act ("INA"). It observed that petitioners had a choice whether to hire illegal aliens in the first place, and to hold that a company could avoid certification on the basis of the employees' immigration status would

"giv[e] employers an extra incentive to hire aliens and thus would be defeating the goals of the immigration laws" (583 F.2d at 360). The court found the "obvious possibility" to be "that a company would hire illegal aliens without informing the Immigration and Naturalization Service and without seeking certification of the aliens from the Secretary of Labor, as more responsible employers frequently do * * *, [1] knowing that if the aliens successfully unionize they could then be reported to the Immigration and Naturalization Service and deported." *Ibid.* (footnote and citation omitted). The court concluded that in view of petitioners' prior knowledge of the employees' immigration status and petitioners' failure to seek approval from the Secretary of Labor for them to work, "it ill becomes [petitioners] to argue after losing the election that certification would conflict with the immigration laws" (*id.* at 360).

3. a. The instant case arises out of a second unfair labor practice proceeding against petitioners. The Board, adopting the findings and conclusions of the Administrative Law Judge ("ALJ"), found that petitioners violated Section 8(a)(1) of the Act by: (i) threatening employees with less work if they supported the Union and promising more work if they did not; (ii) interrogating employees about their Union sentiments; (iii) threatening the employees immediately after the election to notify the INS because they had supported the Union; and (iv) threatening to go out of business because the Union won the election (Pet. App. 61a-62a, 73a-74a, 77a).

The Board also held that petitioners had violated Section 8(a)(3) and (1) when, "with full knowledge that the employees in question had no work permits," they requested the INS to investigate the employees' status "solely because the employees supported the Union" (Pet. App. 62a). The Board affirmed the ALJ's finding that "the discriminatees' subsequent deportation was the proxi-

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[1] See Sections 212(a)(14), 101(a)(15)(H), and 214(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14), 1101(a)(15)(H), and 1184(c); 20 C.F.R. Parts 655 and 656.

mate result of [petitioners'] discriminatorily motivated action * * * and constitutes a constructive discharge" (Pet. App. 61a-62a, 74a).

b. With respect to the remedy, the Board ordered petitioners to cease and desist from discouraging membership in or support of the Union by interrogating employees about their Union sympathies, threatening them with less work if they support the Union and more work if they do not, threatening to notify the INS of employees' status because of their support of the Union, and actually notifying the INS of employees' status because of that support and thereby causing their constructive discharge (Pet. App. 64a, 82a). The Board did not, however, adopt the ALJ's recommendation with respect to reinstatement and backpay for the five alien employees who the Board found to have been constructively discharged.

The ALJ had concluded that reinstatement would be an appropriate remedy if the employees could lawfully work in the United States (Pet. App. 79a-80a). The ALJ found, however, that petitioners' March 29, 1977 letter offering the discriminatees reinstatement was inadequate because it gave them only "20 days or less to initiate procedures to re-enter the United States on work permits or other valid basis" (Pet. App. 80a). The ALJ recommended instead that they be allowed six months to return and accept reinstatement (*id.* at 79a-80a). The ALJ also found that because the letters were not sent by registered mail with return receipts requested, there was no evidence that the offers had been received (*ibid.*). The ALJ declined to recommend an award of backpay because liability for backpay ordinarily is tolled during the period that discharged employees are unavailable for work (Pet. App. 80a-81a).

The Board agreed with the ALJ that reinstatement is an appropriate remedy. The Board also found petitioners' March 29, 1977 letter offering reinstatement to have been deficient, but on a ground other than those identified by the ALJ. It found that the letter was not unconditional,

because it offered reinstatement on the condition that "reemployment shall not subject Sure-Tan, Inc. to any violations of United States immigration laws" (Pet. App. 20a).[2] The Board also found that the ALJ's analysis of the remedial issue was "unnecessarily speculative." The Board explained that the ALJ's recommendation that the offer of reinstatement be kept open for six months and his failure to recommend an award of backpay were premised upon the discriminatees' unavailability for work, even though there was no evidence that the employees had not actually returned to the United States. The Board therefore ordered the conventional remedy of reinstatement and backpay, with matters pertaining to the availability of the employees to be resolved in compliance proceedings (Pet. App. 63a).[3]

4. a. The court of appeals upheld the Board's finding of violations of Section 8(a)(1) of the Act arising out of petitioners' threatening and interrogation of employees, including their threat to report alien employees to the

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[2] The Board therefore did not consider the ALJ's conclusion that the offer of reinstatement was deficient because the period for acceptance was too short and because there was good reason to question the usual presumption that the offer had been received by the discriminatees (Pet. App. 20a).

[3] The General Counsel of the Board then filed a motion to "clarify" the Board's order to make certain that any offer of reinstatement was subject to the condition that the discriminatees lawfully reenter the country with appropriate working permits and to limit the accrual of backpay to those periods, if any, during which the discriminatees were lawfully present in the country and properly documented for employment (Pet. App. 53a-60a). The Board, two Members dissenting, denied the motion (*id.* at 40a-52a). The Board found no reason at that stage to depart from its normal compliance procedures (*id.* at 44a), under which "[t]he backpay period runs from the discriminatory loss of employment to the bona fide reinstatement offer"; the accrual of backpay would be tolled during the time that employees were unavailable for work; and backpay would be placed in an escrow account "for the normal 2-year period" if the discriminatees were not immediately located (Pet. App. 41a-42a).

INS (Pet. App. 3a-6a). Petitioners do not challenge the decision of the court of appeals in this respect.

The court also upheld the Board's finding that petitioners were motivated by anti-union animus in reporting the employees to INS and violated Section 8(a)(3) and (1) in doing so (Pet. App. 8a-15a). The court found the element of anti-union animus to be "flagrantly met in this case," because "[t]he record is replete with examples of [petitioners'] blatantly illegal course of conduct to discourage its employees from supporting the Union" (Pet. App. 14a (footnote omitted); see also *id.* at 10a-12a). The court held that "[b]y putting the INS on notice of these alien employees when it knew of their illegal status, [petitioners] took action which was the proximate cause of their departure" (Pet. App. 12a).

The court also rejected petitioners' contention that they were legally obligated to disclose the presence of the aliens to the INS, concluding that no provision of the INA imposes such a legal duty. The court recognized that an employer nevertheless ordinarily should notify the INS if he suspects that his employees are in the United States without authorization, but the court concluded that "an employer has no right to rely on a 'moral obligation' to report illegal aliens (of which he has been previously oblivious) merely to sanctify an otherwise unjustifiable violation of Section 8(a)(3)" (Pet. App. 13a).

b. The court found the usual remedy of reinstatement and backpay appropriate in these circumstances. In the court's view, it would be anomalous to hold that undocumented aliens are employees covered by the Act but then to refuse effective remedies. The court also noted that the rights of both alien and non-alien employees were at issue because discrimination against the alien employees undermined the Union's support during the crucial period immediately after certification. Thus, the court concluded that reinstatement and backpay would vindicate the policies of the NLRA and deter similar conduct in the future (Pet. App. 19a). The court did, however, modify the Board's remedial order in several respects.

The court first concluded that reinstatement would be proper only if the discriminatees are legally present and free to be employed in the United States when they present themselves for reinstatement (Pet. App. 22a). The court also disagreed with the Board that petitioners' March 29, 1977 offer of reinstatement was not unconditional because it was contingent upon petitioners' not violating the immigration laws. The court observed that this condition was not actually a legal impediment to reinstatement, since the INA does not prohibit an employer from hiring an illegal alien, and concluded that in any event this condition would have been understood by the recipient as imposing the reasonable condition that he lawfully reenter the United States (Pet. App. 21a-22a). The court held, however, that the reinstatement offers were deficient on other grounds: because they did not allow the employees a reasonable time to make arrangements for a legal entry, were not delivered in a manner allowing verification of receipt, and were not written in Spanish (Pet. App. 22a). The court held that the reinstatement offers should be left open for a period of four years (*ibid.*).

The court of appeals also modified the Board's order to make clear that in computing backpay, discriminatees would be deemed unavailable for work during any period in which they were not lawfully entitled to be present and work in the United States (Pet. App. 23a). The court observed, however, that in this case the discriminatees might not have been lawfully available for work at any time prior to the new offer of reinstatement and that they therefore might receive no backpay under the usual rules. The court expressed the view that in these circumstances, an award of some minimum amount of backpay notwithstanding the employees' unavailability—to account in some measure for the period the aliens would have remained in the United States if they had not been reported to the INS for discriminatory reasons—would better effectuate the purposes of the Act. The court believed that six months' backpay would be the minimum amount appropriate for this purpose, and suggested that the

Board consider that remedy (Pet. App. 24a). The Board accepted the court's suggestion in this particular case, although in doing so it did not purport to articulate a remedial policy for such cases generally.[4] The backpay award is subject to setoffs for other earnings during the six-month period (Pet. App. 28a).[5]

SUMMARY OF ARGUMENT

I. The application of the National Labor Relations Act (NLRA) to unfair labor practices committed against undocumented aliens is consistent with the terms and furthers the purposes of both the NLRA and the Immigration and Nationality Act ("INA"). The term "employee" is defined broadly in Section 2(3) of the NLRA to include "any employee," with exceptions not relevant here, and nothing suggests that an employee's status under the immigration laws removes him from coverage. Moreover, to exclude undocumented aliens from the right to participate in union activities free of intimidation by the employer would create a subclass of employees in an employer's work force who have no protected stake in the collective goals of the employees. This would substantially undermine the unified strength Congress found necessary for collective bargaining and resulting industrial peace and would adversely affect the wages and working conditions of citizens and lawfully resident aliens.

This Court concluded in *De Canas* v. *Bica*, 424 U.S. 351, 360 (1976), that the employment of undocumented aliens is at most a "peripheral concern" of the INA. For example, although it is unlawful under 8 U.S.C. 1324

[4] The Board did not issue a new decision regarding the six-month minimum backpay award suggested by the court, but the Board's proposed judgment order (Pet. App. 30a-35a) was intended to incorporate the six-month minimum. The Board's proposed order, however, left the court "uncertain whether the Board [had] adopted [the] suggestion" (*id.* at 28a), and the court modified the judgment to make it clear that the discriminatees are entitled to a minimum award of six months' backpay (*id.* at 29a).

[5] A petition for rehearing with suggestion for rehearing en banc was denied, with three judges dissenting (Pet. App. 36a-39a).

(a)(3) knowingly to harbor an illegal alien, employment is expressly excluded from that prohibition. Moreover, the provisions of the INA that provide for the exclusion of aliens and impose criminal sanctions for their conduct apply principally at the time of entry and likewise do not focus specifically on employment. Application of the NLRA to undocumented aliens therefore is not inconsistent with the INA. To the contrary, enforcement of the NLRA in this setting furthers the purposes of the INA's labor certification protections by creating a disincentive for employers to hire undocumented aliens on substandard terms that would adversely affect the job opportunities and wages and working conditions of citizens and lawfully resident aliens.

II. Petitioners constructively discharged the undocumented alien employees in violation of Section 8(a)(3) and (1) of the NLRA by reporting them to the INS in retaliation for their union activities, which caused them to be arrested and depart the country. Petitioners clearly would have been prohibited from firing the employees outright for this reason, and it could not accomplish the same result indirectly by reporting them to the INS.

The finding of an unfair labor practice in these circumstances is fully consistent with the INA. When Congress chose not to make it unlawful for employers to hire undocumented aliens, it obviously did not anticipate that employers who do so would report the aliens to the INS. In fact, Congress rejected proposals to require such reporting. Thus, the governmental interest in receiving information about violations of the INA applies with less force in the case of reporting by employers who knowingly hire undocumented aliens. On the other hand, the purposes of the NLRA apply with particular force in this setting, because the undocumented aliens are especially vulnerable to exploitation by their employers, which in turn adversely affects the employer's other employees. It also is relevant that petitioners themselves facilitated the undocumented alien employees' unlawful residence by continuing to employ them.

III. The remedial order requiring petitioners to pay a minimum of six months' backpay to the discharged employees effectuates the purposes of the NLRA. Backpay is a standard remedy when employees are unlawfully discharged. The award in this case reflects the fact that the employees would have remained in petitioners' employ for some time if they had not been reported to the INS. Because employment of the aliens was not unlawful under the INA and petitioners took advantage of the exemption in the INA by employing them, petitioners cannot be heard to contend that employment of the discriminatees was so contrary to public policy that petitioners cannot be held liable for constructively discharging them for retaliatory reasons. The Board's inability to provide an effective remedy in these circumstances would encourage similar acts in the future and undermine the rights of lawfully resident employees.

IV. The requirements that petitioners' offers of reinstatement be written in Spanish and provide for verification of receipt are reasonably calculated to ensure that the offers will be effectively communicated to the discriminatees in Mexico. The requirement that the discriminatees be allowed four years within which to return to accept reinstatement also is reasonable, in light of the delays that applicants from Mexico face in obtaining immigrant visas.

ARGUMENT

Petitioners do not dispute that they are engaged in commerce and that their labor practices therefore are subject to the NLRA.[6] Nor do petitioners take issue with the conclusion by the Board and court of appeals that the undocumented aliens they employed are "employees" within the meaning of the Act[7] and that it therefore was illegal for petitioners to "interfere with, restrain, or coerce" those employees in the exercise of their rights under the

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[6] Section 2(6) and (7), 29 U.S.C. 152(6) and (7).

[7] Section 2(3), 29 U.S.C. 152(3). See *Sure-Tan I*, *supra*, 583 F.2d at 358-359.

Act [8] or to discourage their membership in a labor organization "by discrimination in regard to hire or tenure of employment or any term or condition of employment." [9] Accordingly, petitioners have not sought review of the Board's holding, affirmed by the court of appeals, that they violated Section 8(a)(1) by threatening and interrogating those employees with regard to their Union sentiments and activities, including threatening to report them to the INS in retaliation for their Union activities.

Petitioners also do not challenge the Board's finding that when they followed through on their threat to report the undocumented alien employees to the INS, they were motivated solely by anti-union animus (Pet. App. 62a; see Pet. Br. 19)—a fact the court of appeals found was "flagrantly" present in this case, in light of petitioners' "blatantly illegal course of conduct to discourage its employees from supporting the Union" (Pet. App. 14a). Petitioners nevertheless contend that their reporting of the employees to the INS in retaliation for their Union activities did not violate the Act and that the employees' loss of their jobs as a result is none of petitioners' concern. This contention should be rejected.

Although petitioners do not specifically dispute that the five aliens involved here were their "employees" within the meaning of the NLRA notwithstanding their status under the INA, the principal theme of petitioners' argument nevertheless is that the court of appeals' decision is inconsistent with the INA. In order to demonstrate that no such inconsistency exists, we shall begin with a discussion of the coverage of undocumented aliens under the NLRA and the broader question of the proper accommodation of the NLRA and the INA in this setting.

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[8] Section 8(a)(1), 29 U.S.C. 158(a)(1).

[9] Section 8(a)(3), 29 U.S.C. 158(a)(3).

I. THE APPLICATION OF THE NATIONAL LABOR RELATIONS ACT TO UNFAIR LABOR PRACTICES COMMITTED AGAINST ALIENS WHO ARE PRESENT IN THE UNITED STATES IN VIOLATION OF THE IMMIGRATION AND NATIONALITY ACT IS CONSISTENT WITH THE TERMS OF BOTH ACTS AND SUBSTANTIALLY FURTHERS THE POLICIES OF EACH

The Board consistently has construed the NLRA as applying to undocumented aliens (see page 17, *infra*), and the only two courts of appeals that have considered the question have agreed with the Board's interpretation. See *Sure-Tan I*, *supra*, 583 F.2d at 359; *NLRB* v. *Apollo Tire Co.*, 604 F.2d 1180, 1182-1183 (9th Cir. 1979). This interpretation of the Act is clearly correct. There is no basis for concluding that an individual who occupies the position of an employee is excluded from coverage under the NLRA because of his status under the INA. To the contrary, a holding that undocumented aliens are not covered by the NLRA would create an incentive for an employer to hire such aliens to avoid his obligations under the NLRA and thereby encourage the illegal entry of aliens in contravention of the INA.

A. The Terms And Policies Of The National Labor Relations Act Fully Support The Coverage Of Undocumented Aliens

Section 2(3) of the NLRA broadly provides that "[t]he term 'employee' shall include *any* employee" (29 U.S.C. 152(3); emphasis added), subject only to specifically enumerated exceptions for agricultural laborers, domestic workers, individuals employed by their spouses or parents or as independent contractors, supervisors, and individuals employed by a person who is not an employer under the Act. *Ibid.* There is no suggestion that the five aliens involved here fall within any of these exceptions. Nor is there any reason to believe that Congress intended to

fashion an implied exception for undocumented aliens.[10] The express enumeration of employees not covered suggests that other exclusions were not contemplated.[11]

Moreover, this Court has made clear that the statutory term employee "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship" and that "its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications." *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 129 (1944) (footnote omitted). There is nothing in the "economic relationship" between an undocumented alien and his employer that distinguishes the alien from other employees who concededly are covered by the Act; the alien's status under the INA is essentially irrelevant to that relationship.[12]

The "purpose of the Act" referred to in *Hearst Publications* is "to avert the 'substantial obstructions to the free flow of commerce' which result from 'strikes and other forms of industrial strife or unrest' by eliminating the causes of that unrest" (322 U.S. at 126, quoting NLRA, Section 1, 29 U.S.C. 151). Congress determined that this purpose would be furthered by encouraging collective bargaining by employees and "by 'protecting the exercise * * * of full freedom of association, self-organization, and desig-

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[10] A bill was introduced in the House of Representatives in 1979 to exclude from the definition of "employee" any "alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment." H.R. 2442, 96th Cong., 1st Sess. (1979). No action was taken on the bill.

[11] Cf. *State Bank of India*, 229 N.L.R.B. 838, 841 (1977) (asserting jurisdiction over a foreign government's commercial activities in the United States: "there is no basis for believing that the Act was intended to exclude any employees in our country whose employer in this country is an 'employer' engaged in commerce within the meaning of the Act").

[12] Compare *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 179, 190 (1981); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 278-279, 281-282 (1974).

nation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.'" 322 U.S. at 126. Congress also determined that the inequality of bargaining power of employees who do not have such rights "tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." 29 U.S.C. 151. See *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180, 190 (1978).

The purposes Congress sought to advance clearly are furthered by the Board's construction of the Act as covering undocumented aliens. The exclusion of such aliens from union representation and from the right to participate in union activities free of intimidation by the employer would create a subclass of workers within an employer's labor force who often would be indistinguishable from other employees in terms of the work they perform and their relationship with the employer, but who nevertheless would have no protected stake in the collective goals of their co-workers. This result would destroy the unified strength Congress found to be necessary for effective collective bargaining and resulting industrial peace. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937); Note, *Retaliatory Reporting of Illegal Alien Employees: Remedying the Labor-Immigration Conflict*, 80 Colum. L. Rev. 1296, 1298-1299 (1980). Moreover, if an employer were free to threaten and coerce the undocumented aliens among his employees, he could create an atmosphere of intimidation in the workplace generally that would undermine the exercise of associational rights even by those employees who are lawfully present in the United States.

These are very real concerns. This Court has noted the susceptibility of undocumented aliens to exploitation by employers. *Plyler* v. *Doe*, 457 U.S. 202, 219 & n.18 (1982); *United States* v. *Brignoni-Ponce*, 422 U.S. 873,

879 (1975).[13] And with particular relevance to the statutory goals in Section 1 of the NLRA, the Court has observed that "acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions." *De Canas* v. *Bica*, 424 U.S. 351, 356-357 (1976).[14] The policies of the NLRA there-

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[13] This Court's observations are supported by a broad consensus of others who have studied the problem that some employers prefer to hire undocumented aliens in order to maintain an "exploitable" workforce unlikely to protest substandard wages, benefits and working conditions. See H.R. Rep. No. 98-115 (Pt. 1), 98th Cong., 1st Sess. 32-33, 37 (1983); *id.* (Pt. 2) at 33, 36; Sehgal & Vialet, *Documenting the Undocumented*, 103 Monthly Lab. Rev. No. 10, at 20 (October 1980); U.S. Domestic Council Committee on Illegal Aliens, *Preliminary Report* 148, 159-160 (December 1976); Note, *supra*, 80 Colum. L. Rev. at 1299; Kutchins & Tweedy, *No Two Ways About It: Employer Sanctions Versus Labor Law Protections for Undocumented Workers*, 5 Ind. Rel. Law J. 339, 360, 368-369 (1983); U.S. Dep't of Labor, Research & Development Contract No. 20-11-74-21, *The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study* 164 (1976) (hereinafter *"Exploratory Study"*); *Immigration Reform and Control Act of 1982: Joint Hearings on H.R. 5872 and S. 2222 Before the House and Senate Comms. on the Judiciary*, 97th Cong., 2d Sess. 700-701 (1982) (hereinafter *"Joint Hearings"*). Accordingly, strict enforcement of protective labor legislation has been advocated as a way to curtail job opportunities for undocumented workers. See Statement of President Reagan announcing establishment of the Special Targeted Enforcement Program (STEP) for the Fair Labor Standards Act, 17 Weekly Comp. Pres. Doc. 829 (July 30, 1981); S. Rep. No. 97-485, 97th Cong., 2d Sess. 24 (1982); Dep't of Labor, *Field Operations Handbook* ¶ 52Z00 (Dec. 28, 1981); Select Commission on Immigration and Refugee Policy, *Final Report: U.S. Immigration Policy and the National Interest*, 97th Cong., 1st Sess. 70 (1981); *Exploratory Study*, *supra*, at 173-174; *Joint Hearings*, *supra*, at 211.

[14] See also, *e.g.*, H.R. Rep. No. 98-115 (Pt. 1), *supra*, at 32-33; *id.* (Pt. 2) at 33; S. Rep. No. 97-485, 97th Cong., 2d Sess. 5 (1982); H.R. Rep. No. 94-506, 94th Cong., 1st Sess. 6-8, 10 (1975); H.R. Rep.

fore strongly support including undocumented aliens within the coverage of the Act. This has been the Board's consistent view. The Board has included undocumented aliens in bargaining units,[15] and has found violations of the Act in the discriminatory discharge of such workers[16] and threats of deportation directed at them for engaging in union activity[17] or for testifying in Board proceedings.[18]

B. Application Of The National Labor Relations Act To Undocumented Aliens Is Consistent With And Furthers The Purposes Of The Immigration And Nationality Act

The application of the NLRA to undocumented aliens does not conflict with the provisions of the INA and in fact furthers the policies of that Act by removing incentives for employers to hire illegal aliens. As this Court observed in *De Canas* v. *Bica*, "[t]he central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country," and the INA "cannot be said to draw in the employment of illegal aliens as 'plainly within * * * [that] central aim of federal regulation.'" 424 U.S. at 359, quoting *San Diego Unions* v. *Garmon*, 359 U.S. 236, 244 (1959) (second brackets in *De Canas* opinion; footnote omitted). The Court in *De Canas* instead found in the INA "at best evidence of a peripheral concern with employment of illegal entrants" (424 U.S. at 360; footnote omitted).

No. 93-108, 93d Cong., 1st Sess. 7-8, 15-16 (1973); H.R. Rep. No. 92-1366, 92d Cong., 2d Sess. 3-4 (1972).

[15] *Duke City Lumber Co.*, 251 N.L.R.B. 53, 54 (1980); *Sure-Tan I, supra*; *Lawrence Rigging, Inc.*, 202 N.L.R.B. 1094, 1095 (1973).

[16] See, *e.g.*, *Apollo Tire, Inc.*, 236 N.L.R.B. 1627 (1978), enforced, 604 F.2d 1180, 1182-1183 (9th Cir. 1979); *Amay's Bakery & Noodle Co.*, 227 N.L.R.B. 214 (1976).

[17] See, *e.g.*, *Hasa Chemical, Inc.*, 235 N.L.R.B. 903, 906 (1978).

[18] *John Dory Boat Works*, 229 N.L.R.B. 844, 851-852, 853 (1977).

1. The INA does not make it unlawful for an employer to hire an alien who is present or working in the United States without authorization. Under 8 U.S.C. 1324(a)(3), it is unlawful for any person knowingly to conceal, harbor, or shield from detection any alien not duly admitted or lawfully entitled to enter or reside in the United States. However, a proviso to 8 U.S.C. 1324(a) states that "employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." See *De Canas* v. *Bica*, *supra*, 424 U.S. at 360 & n.9. Thus, on its face, the INA does not address the subject of employment of illegal aliens. The legislative history reveals that this choice was carefully considered.

In 1952, before the INA was passed, Congress enacted special legislation to strengthen then-existing law designed to assist in preventing aliens from entering or remaining in the United States illegally. See Act of Mar. 20, 1952, ch. 108, 66 Stat. 26.[19] As reported by the Senate Judiciary Committee, the relevant provisions of the bill were the same as those now contained in 8 U.S.C. 1324(a), discussed above. However, on the Senate floor, Senator Douglas proposed an amendment that would have imposed criminal sanctions on an employer who knowingly hired illegal aliens (98 Cong. Rec. 798, 803 (1952)). The proposed amendment was extensively debated. *Id.* at 798-800, 802-811. Proponents contended that the proviso in the committee bill exempting employment of illegal aliens created a loophole that would encourage illegal immigration and lead to exploitation,[20] and opponents con-

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[19] The 1952 Act amended Section 8 of the Immigration Act of 1917 (39 Stat. 880, 8 U.S.C. (1946 ed.) 144) in response to this Court's holding in *United States* v. *Evans*, 333 U.S. 483 (1948), that Section 8 did not make harboring of illegal aliens a punishable offense. See S. Rep. No. 1145, 82d Cong., 2d Sess. 2 (1952).

[20] See 98 Cong. Rec. 794, 804, 806-807 (1952) (remarks of Sen. Lehman); *id.* at 798, 803-804, 812 (remarks of Sen. Douglas); *id.* at 798-799, 812 (remarks of Sen. Humphrey); *id.* at 805-806 (remarks of Sen. Cordon).

tended that it would be wrong to punish employers who "were used to a long practice of carelessness" with regard to illegal entrants (*id.* at 794 (remarks of Sen. Kilgore)), could not find the necessary labor, and may not be able to identify illegal aliens among their workers.[21] The amendment was defeated by a vote of 69-12. *Id.* at 811. The bill was enacted with the exemption for employment (66 Stat. 26),[22] and the exemption was incorporated into the INA later in 1952 without further debate.[23]

Thus, the exemption of employment from the prohibition against harboring in 8 U.S.C. 1324(a) is the product of a considered congressional judgment not to make it unlawful for an employer to hire an alien who is present in the United States in violation of the immigration laws. Since, from the employer's perspective, the employment relationship with undocumented aliens is not illegal under federal law, there is no basis for concluding that the application of the NLRA to the employer's labor practices insofar as they affect such aliens is in any way inconsistent with the INA. In other words, the employer cannot have it both ways, freely accepting the work of aliens who are present or working in violation

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[21] See 98 Cong. Rec. 794, 807 (1952) (remarks of Sen. Kilgore); *id.* at 795 (remarks of Sen. Chavez); *id.* at 796 (remarks of Sen. Connally); *id.* at 798 (remarks of Sen. McFarland); *id.* at 799-800, 809 (remarks of Sen. Magnuson); *id.* at 803 (remarks of Sen. Knowland); *id.* at 805 (remarks of Sen. Langer); *id.* at 806 (remarks of Sen. Welker); *id.* at 808 (remarks of Sen. McClellan); *ibid.* (remarks of Sen. Stennis); *id.* at 812 (remarks of Sen. Eastland).

[22] Although an amendment similar to that proposed by Senator Douglas was not offered in the House of Representatives, the issue of the employment of illegal aliens was debated in the House. See 98 Cong. Rec. 1348 (1952) (remarks of Rep. Celler); *id.* at 1351 (remarks of Rep. Fernandez); *id.* at 1352 (remarks of Rep. Fisher); *id.* at 1415-1416 (remarks of Rep. Fisher). Moreover, in the previous Session, the House had successfully resisted passage of a similar criminal prohibition. See page 33, *infra*.

[23] See 98 Cong. Rec. 4400, 5757 (1952).

of the INA and yet ignoring applicable laws governing his dealings with his employees generally.

2. To be sure, the INA does impose restrictions on aliens. But these provisions likewise do not directly address the employment relationship between an undocumented alien and his employer. In 8 U.S.C. 1182(a), Congress has established numerous qualifications for the admission of aliens, providing for the exclusion of aliens who are ill or insane, drug addicts, convicted criminals, paupers, subversives, etc. Among those excluded are aliens seeking to perform skilled or unskilled labor, unless the Secretary of Labor has certified that there are insufficient workers in the United States who are able, willing, qualified and available for the work and "the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed." 8 U.S.C. 1182(a)(14).[24] The INA also permits the admission of aliens as nonimmigrants to perform temporary services or labor only "if unemployed persons capable of performing such service or labor cannot be found in the country" (8 U.S.C. 1101(a)(15)(H)(ii)).

These restrictions, however, address the matter of an alien's employment in the United States principally as of the time the alien seeks admission, by providing for the exclusion of aliens as immigrants unless they meet or are exempt from the requirements of 8 U.S.C. 1182(a)(14) and by barring nonimmigrants other than those covered by 8 U.S.C. 1101(a)(15)(H) from working. Similarly, the criminal provision of the INA generally applicable to aliens (8 U.S.C. 1325) pertains only to con-

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[24] This restriction is applicable to immigrants in the third and sixth preferences—which include aliens seeking to enter to work—and nonpreference aliens. 8 U.S.C. 1182(a)(14), 1153(a)(3), (6) and (7). However, because most immigrants enter under the family unification provisionsof the Act, to which the labor certification requirement is inapplicable, that requirement provides limited protection against competition from foreign labor. See *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 Harv. L. Rev. 1286, 1348 (1983).

duct at the time of entry. That Section makes it a criminal offense for an alien to enter at other than a designated location, to elude inspection, or to obtain entry by a false or misleading statement or concealment of a material fact. This provision does not focus specifically on the alien's subsequent employment in the United States, and Congress has not made it a separate criminal offense for an alien to accept employment without authorization after he has entered the United States.[25]

Aliens who entered the United States without inspection and nonimmigrant aliens who were duly admitted but fail to maintain their status may be deported. 8 U.S.C. 1251(a) (2) and (9). However, these provisions and the other grounds for deportation likewise do not focus specifically on the question of the alien's employment in the United States.[26] Furthermore, the remedy of deportation operates *prospectively* by removing the alien from the resident population. Deportation does not erase the fact of the alien's prior presence in the United States or address the various consequences of that pres-

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[25] In 1973, when the House Judiciary Subcommittee was considering an employer sanctions bill, it deleted a provision to impose criminal sanctions on the undocumented alien who accepts a job because the Subcommittee did not want to punish a person who worked as a result of his need for a job. See 119 Cong. Rec. 14184 (remarks of Rep. Dennis). Under 8 U.S.C. 1326, if an alien was once arrested or excluded and deported and *thereafter* enters, attempts to enter, or is found in the United States, he is subject to criminal penalties unless the Attorney General has expressly consented to his reapplication. However, as the court of appeals observed (Pet. App. 17a), because the aliens in this case accepted voluntary departure status in lieu of deportation, they are not subject to the separate prohibition in 8 U.S.C. 1326.

[26] Of course, unauthorized employment is one of the grounds on which a nonimmigrant may be found to have failed to maintain his status and thus subject to deportation under 8 U.S.C. 1251(a)(9). Also, in 1976, Congress amended Section 245 of the Act to make a non-immigrant alien who accepts unauthorized employment ineligible for adjustment of his status to that of a permanent resident alien. See 8 U.S.C. 1255(c). Congress has not yet attached any other consequences to such employment, however.

ence. There accordingly is no inconsistency with these provisions of the INA if the NLRA is applied to an employment relationship entered into by an undocumented alien prior to the execution of the statutory remedy of deportation.

3. In a broader sense, of course, the INA may be said to embody a policy of protecting American workers, not only through the specific work-related provisions of 8 U.S.C. 1101(a)(15)(H) and 1182(a)(14), but in its overall limitations on the number of aliens who may enter the United States and thereby be lawfully available for work. Moreover, to the extent aliens are able to obtain employment in the United States, even if not at the expense of domestic workers, there is an incentive for aliens to enter the United States in violation of the immigration laws generally. As we explain below (see pages 23-25, 30-36, *infra*), application of the NLRA to an employer's unfair labor practices committed against undocumented aliens is consistent with these principles and substantially furthers the policies of the INA.

Even if some conflict were perceived, however, these general policies of the INA would not alone be sufficient to preclude the application of the NLRA to undocumented aliens. It is necessary instead to determine whether the particular provisions of the INA through which Congress has chosen to *implement* those policies actually conflict with the application of the NLRA in this setting. See, *e.g.*, *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 633-634 (1981); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 133-134 (1978). They do not, for Congress has chosen not to pursue its immigration policies "at all costs." *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, No. 81-1945 (Apr. 20, 1983), slip op. 29-30. Despite extensive public debate and numerous proposals, Congress thus far has declined to adopt what is widely regarded as the only effective measure to reduce illegal immigration and the competition by illegal entrants for domestic jobs: the imposition of sanctions on an employer who hires un-

documented aliens.[27] See, *e.g.*, *United States* v. *Ortiz*, 422 U.S. 891, 915 (1975) (White, J., concurring in the judgment); *De Canas* v. *Bica*, *supra*, 424 U.S. at 357; *Plyler* v. *Doe*, *supra*, 457 U.S. at 218, 228-229; *id.* at 237 (Powell, J., concurring). The Senate has passed such a bill in the current Congress,[28] and a similar bill has been reported in the House of Representatives.[29] But at least until Congress actually passes such a measure, in view of the express exemption for employment of undocumented aliens in 8 U.S.C. 1324(a), there is no basis for failing to apply the NLRA to such employment.

In any event, enforcement of the NLRA with respect to unfair labor practices committed against undocumented aliens in fact substantially *furthers* the policies of INA, including its employment-related provisions. The text of

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[27] See generally S. Rep. No. 97-485, 97th Cong., 2d Sess. 20-26 (1982). In 1971 and 1972, a subcommittee of the House Judiciary Committee conducted extensive hearings regarding the control of illegal immigration. See *Illegal Aliens, Hearings Before a Subcomm. of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971) (Pts. 1-5). In the 92d and 93d Congresses, the House of Representatives passed bills providing for employer sanctions. H.R. 16188, 92d Cong., 2d Sess. (1972); 118 Cong. Rec. 30186 (1972); H.R. 982, 93d Cong., 1st Sess. (1973); 119 Cong. Rec. 14194-14195, 14208-14209 (1973). No action was taken on these bills in the Senate. In the 94th Congress, the House Judiciary Committee reported a bill containing employer sanctions (H.R. 873, 94th Cong., 1st Sess. (1975); see H.R. Rep. No. 94-506, 94th Cong., 1st Sess. (1975)), but no further action was taken on it. A similar bill was introduced in the next Congress (H.R. 1663, 95th Cong., 1st Sess. (1977)), but it received no further action. After several intervening years of study, the Senate, in the last Congress, passed a bill containing employer sanctions (S. 2222, 97th Cong., 2d Sess. (1982); 128 Cong. Rec. 10618 (daily ed. Aug. 17, 1982)), but the House, after debating a similar bill, failed to act. See H.R. Rep. No. 98-115 (Pt. 1), *supra*, at 31.

[28] S. 529, 98th Cong., 1st Sess. § 101 (1981), passed by the Senate on May 18, 1983, 129 Cong. Rec. 6970 (daily ed.); S. Rep. No. 98-62, 98th Cong., 1st Sess. (1983).

[29] H.R. 1510, 98th Cong., 1st Sess. § 101 (1983). See H.R. Rep. No. 98-115 (Pt. 1), *supra*, at 2-6.

8 U.S.C. 1182(a)(14) makes clear that its purpose is to preserve jobs for American workers and to admit immigrant aliens only if to do so "will not adversely affect the wages and working conditions of the workers in the United States similarly employed." See also S. Rep. No. 748, 89th Cong., 1st Sess. 15 (1965); *Saxbe* v. *Bustos*, 419 U.S. 65, 76 & n.29 (1974); *Pesikoff* v. *Secretary of Labor*, 501 F.2d 757, 761 (D.C. Cir.), cert. denied, 419 U.S. 1038 (1974). Similarly, 8 U.S.C. 1101(a)(15)(H)(ii) permits the temporary admission of nonimmigrant aliens only if unemployed persons capable of performing the work cannot be found in the United States; and Department of Labor regulations implementing this provision require that "to the extent foreign workers are brought in, the working conditions of domestic employees are not to be adversely affected" (*Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, No. 80-1305 (July 1, 1982), slip op. 4).

The purpose of 8 U.S.C. 1101(a)(15)(H)(ii) and 1182(a)(14) to protect the wage rates and working conditions of American workers is directly parallel to the purpose of the NLRA to prevent the "depressing [of] wage rates" and to achieve "stabilization of competitive wage rates and working conditions within and between industries" by encouraging collective bargaining and guaranteeing the right of employees to engage in concerted activities. 29 U.S.C. 151. Thus, vigorous enforcement of the NLRA in the context of unfair labor practices committed against undocumented aliens furthers the purpose of 8 U.S.C. 1101(a)(15)(H)(ii) and 1182(a)(14) by affording some assurance that the wages and working conditions of the American workers sought to be protected by those Sections will not be undermined by the employer's offering of substandard wages and working conditions to undocumented aliens. To the extent that the employer realizes no advantage under the NLRA in preferring undocumented aliens to domestic workers, his incentive to hire undocumented aliens is reduced; and the reduction in job opportunities in turn

will diminish the incentive for aliens to enter in violation of the immigration laws. It was therefore consistent with INA for the Board to enforce the NLRA with respect to petitioners' pattern of unfair labor practices committed against undocumented aliens.[30]

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[30] The Board's refusal to find an implied exclusion of undocumented aliens from the protections afforded employees under the NLRA is consistent with the treatment of undocumented workers under other protective labor legislation and with the recognition of their right to have their civil injuries—including those deriving from an employment relationship—remedied through the courts. Thus, undocumented aliens have been entitled to recover unpaid minimum wages and overtime pay under the Fair Labor Standards Act (*Brennan* v. *El San Trading Corp.*, 73 Lab. Cas. (CCH) ¶ 33,032 (1973)); wages due under a labor contract (*Nizamuddowlah* v. *Bengal Cabaret, Inc.*, 92 Misc. 2d 220, 399 N.Y.S. 2d 854 (Sup. Ct. 1977); *Gates* v. *River Construction Co.*, 515 P.2d 1020 (Alaska 1973)); worker's compensation (*Commercial Standard Fire & Marine Co.* v. *Galindo*, 484 S.W.2d 635 (Tex. Civ. App. 1972)); damages for personal injuries sustained during employment (*Hagl* v. *Jacob Stern & Sons, Inc.*, 396 F. Supp. 779 (E.D. Pa. 1975)); lost wages in a personal injury suit (*Peterson* v. *Neme*, 222 Va. 477, 281 S.E. 2d 869 (1981); damages for personal injuries in general (*Arteaga* v. *Literski*, 83 Wis. 2d 128, 265 N.W. 2d 148 (1978); *Woo Sung Ling* v. *City of New York*, 276 App. Div. 1026, 95 N.Y.S.2d 908 (Sup. Ct. 1950)); damages for wrongful death (*Torres* v. *Sierra*, 89 N.M. 441, 553 P.2d 721 (Ct. App. 1976)); *Arteaga* v. *Allen*, 99 F.2d 509 (5th Cir. 1938)); and damages for breach of a contract of sale (*Moreau* v. *Oppenheim*, 663 F.2d 1300 (5th Cir. 1981)). Cf. *Hurtado* v. *United States*, 410 U.S. 578 (1973). Furthermore, undocumented alien workers in this country also are entitled to the constitutional guarantees of due process and equal protection of the laws. *Plyler* v. *Doe*, *supra*, 457 U.S. at 210; *Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976); *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896).

II. THE BOARD CORRECTLY CONCLUDED THAT PETITIONERS VIOLATED SECTION 8(a)(3) AND (1) OF THE NATIONAL LABOR RELATIONS ACT BY REPORTING THEIR UNDOCUMENTED ALIEN EMPLOYEES TO THE IMMIGRATION AND NATURALIZATION SERVICE IN RETALIATION FOR THEIR UNION ACTIVITIES, THEREBY CONSTRUCTIVELY DISCHARGING THE EMPLOYEES

For the reasons given in Point I, petitioners' pattern of antiunion conduct directed against its undocumented alien employees clearly violated the NLRA. Petitioners contend, however, that the culmination of that course of conduct—their reporting of the employees to the INS because of their Union activities and the employees' resulting loss of their jobs—did not violate the Act. Petitioners of course must concede that Section 8(a)(3) and (1) would have barred them from actually firing the employees for their union activities. But petitioners maintain that they were wholly free to accomplish precisely that result by indirection. They contend that after accepting the labor of these employees knowing of their immigration status, after committing a series of unfair labor practices against them (including threatening to report them to the INS), and after the Regional Director rejected petitioners' objection to the union election that included these employees, they could, with impunity, rid themselves of the employees because of their union activities simply by notifying the INS. We submit that neither the NLRA nor the INA sanctions such flouting by an employer of its obligations under the NLRA.

A. Petitioners' Conduct Constituted A Prohibited Constructive Discharge Of The Employees

Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." This provision "does not interfere with the normal exercise of the right of the

employer to select its employees or to discharge them"; however, the "employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937). See also *NLRB* v. *Transportation Management Corp.*, No. 82-168 (June 15, 1983), slip op. 5-6.

Moreover, "[a]n employer cannot do constructively what the Act prohibits his doing directly." *NLRB* v. *Holly Bra of California, Inc.*, 405 F.2d 870, 872 (9th Cir. 1969). Accordingly, the Board, with court approval, long has held that a discriminatory discharge may be found not only where an unlawfully motivated employer explicitly dismisses an employee, but also where the employer creates a situation that causes the employee to leave his employment. See, *e.g.*, *NLRB* v. *Haberman Construction Co.*, 641 F.2d 351, 358 (5th Cir. 1981); *J.P. Stevens & Co.* v. *NLRB*, 461 F.2d 490, 494 (4th Cir. 1972); *NLRB* v. *Holly Bra*, *supra*; *NLRB* v. *Tennessee Packers, Inc.*, 339 F.2d 203, 204-205 (6th Cir. 1964); *Atlas Mills, Inc.*, 3 N.L.R.B. 10, 17 (1937); *Texas Textile Mills*, 58 N.L.R.B. 352, 353-354 (1944).

An employer may be held to have constructively discharged an employee even though the condition that led to the employee's departure was directly caused by a third party. See, *e.g.*, *NLRB* v. *Newton*, 214 F.2d 472, 475-476 (5th Cir. 1954) (physical ejection from plant of pro-union employees by antiunion employees acquiesced in by employer); *Goodman Lumber Co.*, 166 N.L.R.B. 304, 305 (1967) (employee's father, at behest of employer, created stressful home life by attempting to get employee to revoke union authorization card). Nor is it necessary that the condition that causes the employee to leave his employment occur at the work site or pertain directly to working conditions. Thus in *Goodman Lumber Co.*, *supra*, 166 N.L.R.B. at 305 n.4, the Board explained that, having sought "to utilize the lever of parental control and displeasure to gain its ends [,] [the employer] * * * cannot hide behind the claim that its

unlawful conduct did not cause [the employee] to quit his employment, simply * * * because of an understandable and natural desire to forestall the breakup of his parent's household because of the unnatural strains and pressures exerted on it by [the employer's] conduct." See also *Zenith Optical Co.*, 53 N.L.R.B. 252, 267, 269 (1943) (employee offered choice of resigning or having draft deferment lifted).

Petitioners no longer contest the Board's finding that they had an anti-union motive in creating the circumstances that led to the employees' departure. The element of a direct causal nexus between petitioners' conduct and the employees' loss of their jobs is also clearly present here. INS agent Malin testified at the Board hearing that petitioners' letter was the sole cause of the investigatory visit during which the employees were taken into custody (Pet. App. 12a, 75a), and petitioners knew that the requested INS inquiry would result in the employees' removal from their jobs because they had been aware for some months that the employees did not have proper documentation. See pages 2-4, *supra*.

The court of appeals properly rejected (Pet. App. 12a) petitioners' argument, reasserted here (Br. 13-15), that it was the employees' status as undocumented workers that was the "proximate cause" of the cessation of their employment. The aliens' status under the immigration laws, which petitioners theretofore had ignored, obviously did not in itself "cause" anything—except to the extent it led petitioners to exploit that status in order to avoid their obligations under the NLRA. That the INS might independently have discovered these employees at some time in the future cannot obscure the fact that petitioners engineered their departure when it occurred solely for antiunion reasons.[31]

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[31] Petitioners' reliance (Br. 15) on the fact that the employees were not deported, but instead "voluntarily" left the country, is also misplaced. Upon their apprehension by the INS, the employees were faced with the choice of either remaining in custody to await formal deportation proceedings, or signing INS Form I-274 and

Contrary to petitioners' assertion (Br. 14), it hardly is "fundamentally unfair" to find a violation of the NLRA in these circumstances. That finding is fully consistent with the purpose of the NLRA to prevent discrimination in employment in retaliation for the union activities of employees. Unfairness *would* result, however, if petitioners were free to accomplish that discrimination indirectly, through the INS, free from any consequences under the NLRA.

Petitioners argue (Br. 14) that the INS had a nondiscretionary duty to investigate and deport the undocumented alien employees that was not dependent upon petitioners' actions in notifying INS.[32] The issue in these unfair labor practice proceedings, however, is the propriety of petitioners' conduct in response to their employees' union activities, not the actions of the INS. Obviously, we do not suggest that the INS acted improperly or that it was obligated to forgo its normal procedures because of petitioners' conduct. But the INS's enforcement of the INA does not cleanse petitioners' discriminatory actions of their illegality under the NLRA.

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immediately leaving the country. Both alternatives equally accomplished petitioners' object, which was to terminate the employees' further employment because of their union activities. Petitioners' attempt to rely on the supposed voluntariness of this "Hobson's choice" ignores the very nature of a constructive discharge, whereby an employer creates conditions compelling an abandonment of employment that is "voluntary" in form but not in substance.

[32] Petitioners err in suggesting (Br. 14 & nn.4 & 5) that the INS has no discretion in its enforcement of the INA. Under 8 U.S.C. 1357(a), an INS officer is *authorized* to arrest and interrogate aliens, but the allocation of scarce investigative resources or other circumstances may sometimes impose limitations. Moreover, although an immigration judge ordinarily does not have discretion to terminate deportation proceedings pending before him (*Rodriguez-Gonzalez* v. *INS*, 640 F.2d 1139, 1142 (9th Cir. 1981)); the INS retains some measure of discretion in deciding whether to institute such proceedings. See, *e.g.*, *Pasquini* v. *Morris*, 700 F.2d 658 (11th Cir. 1983).

B. The Board's Finding Of A Violation Of Section 8(a)(3) And (1) Is Consistent With The Immigration And Nationality Act

The Board's finding of a violation of Section 8(a)(3) and (1) also effects an appropriate accommodation of the policies of the NLRA and the INA in the circumstances of this case. We of course agree with petitioners that in the ordinary situation, an employer or any other person who believes that an alien is present and working in the United States in violation of the immigration laws should notify the INS. In the immigration area, as elsewhere, effective law enforcement often depends upon the conscientious cooperation of members of the public. But petitioners did not report their employees to INS as interested citizens seeking to uphold the law. They did so solely to *evade* their obligations under the law, imposed by the NLRA.

Thus, more is at stake in this case than enforcement of the INA. Petitioners' pattern of conduct in violation of the NLRA and its concededly retaliatory motive in reporting the employees directly implicates the equally strong governmental interest in effective enforcement of the NLRA. As we have explained above (see pages 13-25, *supra*), the policies and provisions of the NLRA and INA are consistent in general and reinforce one another in their particular application to undocumented aliens. Within this framework, a number of factors demonstrate that the Board's finding of a violation of Section 8(a)(3) and (1) properly implements the terms and policies of both Acts in the circumstances of this case.

1. It must be stressed at the outset that we do *not* contend that the NLRA generally bars an employer from notifying the INS if it has reason to believe that an alien is present or working in the United States in violation of the immigration laws. Our submission is limited to the particular situation in which the employer reports an undocumented alien to INS in retaliation for his union activities or other exercise of rights protected by

the NLRA.[33] And even within that category, this case presents aggravated circumstances. Petitioners' retaliatory reporting of the employees to the INS was not an isolated incident. It was the culmination of a series of unfair labor practices committed against the same employees, and it followed by one day the Acting Regional Director's overruling of petitioners' objections to the election based on the aliens' status under the immigration laws, thereby manifesting a disregard for the Board's processes as well. There is no reason to believe that the Board's finding of an unfair labor practice in these circumstances would significantly impede enforcement of the INA by deterring the reporting of violations, because an employer who knowingly employs illegal aliens would not ordinarily report them to the INS and thereby forgo whatever advantage he realized in hiring them. The Board's application of Section 8(a)(3) and (1) in this setting is therefore inherently tailored to circumstances in which there is a substantial likelihood—as well as a specific finding—that the employer made a report to the INS for reasons other than a simple desire to cooperate in the enforcement of the INA.

2. More than simply the practicalities of the situation support this conclusion. The text and legislative history

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[33] Petitioners therefore clearly err in contending (Br. 16) that "[t]he court of appeals and the Board have held, in effect, that once illegal alien workers engage in protected union activities, an employer may no longer inquire with the INS, even if it suspects that it might be employing illegal aliens." The Board's holding was based on its finding that the protected union activities actually *motivated* petitioners' conduct, not simply that the union activities preceded petitioners' letter to INS in time. The Board will not find a violation of the Act where such anti-union animus is not present. For example, in *Bloom/Art Textiles, Inc.*, 225 N.L.R.B. 766, 768-769 (1976), noted by the ALJ here (Pet. App. 75a n.5), the Board held that it was not a violation of Section 8(a)(3) for an employer to discharge an undocumented worker who was a union activist where the evidence showed that the reason for the discharge was not the employee's union activity, but the employer's concern that employment of the undocumented worker was unlawful under California law.

of the INA affirmatively establish that Congress itself attached relatively little importance to relying on employers in the enforcement of the INA. The 1952 Act in which Congress enacted what is now 8 U.S.C. 1324 was entitled an Act "[t]o assist in preventing aliens from entering or remaining in the United States illegally" (66 Stat. 26). Yet Congress explicitly exempted employment from the prohibition in that Act against the harboring of illegal aliens, even though the harboring prohibition was the central feature of Congress' strengthening of previously existing prohibitions designed to prevent illegal immigration. See note 19, *supra*. When Congress enacted this special immunity, it obviously did not anticipate that the employers involved would be disposed to report their alien employees to the INS.

Moreover, when the 1952 legislation was under consideration, the subject of an employer's reporting to the INS was specifically addressed in a manner that strongly supports the Board's decision in this case. As we have explained above (see pages 18-19, *supra*), Senator Douglas proposed an amendment to the bill that would have made it unlawful for an employer knowingly to hire an illegal alien. Significantly, Senator Douglas' amendment also would have required an employer who discovered that one of his employees was an illegal alien to report that information to the INS. 98 Cong. Rec. 798 (1952). Senator Cordon, who supported the proposal to prohibit an employer from hiring illegal aliens, opposed the reporting feature of the amendment and inquired whether Senator Douglas would modify his amendment so as "to relieve the employer of the requirement to become affirmatively a policeman" (*id.* at 800). Senator Douglas agreed to the suggested modification of his amendment (*id.* at 800, 802-803), and thereafter stressed that it would not "require the employer to serve as an enforcement agency" (*id.* at 804). See also *id.* at 805 (remarks of Sen. Cordon) (the deleted language would have "required of every employer that he become an adjunct to the law enforcement service, to the Immigration Service"). The fact that even a sup-

porter of the proposed prohibition against hiring illegal aliens was opposed to requiring employers to report to INS if they discover illegal aliens among their employees strongly indicates that Congress, which rejected the employment prohibition altogether, did not perceive such reporting by employers as essential for effective enforcement of the INA.

This conclusion is further supported by Congress' action with respect to the amendment Senator Douglas offered to the bill enacted in 1951 authorizing an extension of the bracero program. Act of July 12, 1951, ch. 223, 65 Stat. 119-121. The Senate included in its bill a provision that would have imposed criminal sanctions on any employer who hired a Mexican alien knowing or having reason to believe that he was unlawfully present in the United States. That amendment also would have required the employer to report such an alien to the INS. See 97 Cong. Rec. 4952, 4960-4961 (1951). The criminal prohibition was deleted by the Conference Committee, which substituted in its place a non-criminal provision barring an employer who knowingly hired aliens who were present in violation of the immigration laws from obtaining alien workers under the bracero program authorized by the bill. H.R. Conf. Rep. No. 668, 82d Cong., 1st Sess. 3, 7-8 (1951). The bill was enacted in that form. 65 Stat. 120. Significantly, however, the reporting requirement was deleted.[34] Thus, the text and legislative history of the 1951 and 1952 Acts reflect a considered congressional judgment not to rely on employers to enforce the immigration laws. This congressional judgment cuts strongly against attaching controlling weight in this case to the governmental interest in encouraging the reporting of violations of the INA.

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[34] During the debates on the 1952 Act, Senator Cordon argued in favor of the Douglas amendment after it was modified to delete the reporting requirement, noting that he could understand that this requirement in the 1951 bracero bill was "exceedingly objectionable to some" (98 Cong. Rec. 805 (1952)).

3. In contrast, the countervailing statutory policies of the NLRA have particular force in the present setting. We previously have noted, as has this Court,[35] that undocumented aliens are especially susceptible to discrimination and exploitation by employers, which in turn adversely affects the job opportunities, wages, and working conditions of citizens and lawfully resident aliens. This vulnerability often stems in part from language and cultural differences or poverty of the alien. But undocumented aliens also "are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation." *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 879. And they are especially vulnerable precisely because of the fear that the *employer* will report them to the INS because of their activities at the workplace, as petitioner did here. The legislative debates over the years on the undocumented alien problem repeatedly have emphasized this factor (often noting instances in which employers have threatened aliens that they will report them to the INS, as petitioners also did here), and have stressed the importance of eliminating such exploitation.[36]

Enforcement of the NLRA where the employer reports its alien employees to INS in retaliation for their union activities is directly responsive to these concerns, and thereby furthers the statutory policy of the NLRA of

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[35] *Plyler* v. *Doe*, *supra*, 457 U.S. at 219 & n.18; *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 879.

[36] H.R. Rep. No. 92-1366, 92d Cong., 2d Sess. 4 (1972); H.R. Rep. No. 93-108, 93d Cong., 1st Sess. 7-8, 15-16 (1973); H.R. Rep. No. 94-506, 94th Cong., 1st Sess. 6-7, 10 (1975); 98 Cong. Rec. 797 (1952) (remarks of Sen. Douglas); *id.* at 798, 803 (remarks of Sen. Humphrey, referring to "employer blackmail"); *id.* at 804 (remarks of Sen. Lehman); 118 Cong. Rec. 30155 (1972) (remarks of Rep. Rodino); *id.* at 30159 (remarks of Rep. Eilberg); *id.* at 30160 (remarks of Rep. Mayne); *id.* at 30163 (remarks of Rep. Daniels); 119 Cong. Rec. 14181 (1973) (remarks of Rep. Eilberg); *id.* at 14182 (remarks of Rep. Keating); *id.* at 14185 (remarks of Rep. Rodino); *id.* at 14191 (remarks of Rep. Mayne); *id.* at 14192 (remarks of Rep. Bingham).

encouraging collective bargaining and the freedom of employees generally in the exercise of their rights. The status of the individual employees under the INA does not alter this conclusion. The prohibitions and remedies of the NLRA "are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights." *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 543 (1943). See also *Shepard* v. *NLRB*, No. 81-1627 (Jan. 18, 1983), slip. op. 7-8.

4. It also is relevant that petitioners themselves facilitated the unlawful presence of the aliens in the United States—the very conduct petitioners reported to the INS—by continuing to employ them. Although Congress enacted an exemption from the criminal prohibitions in 8 U.S.C. 1324(a) for employment of undocumented aliens, this does not serve to divorce petitioners as a factual matter from their complicity in the aliens' presence in violation of the immigration laws. Petitioners therefore do not have a strong equitable claim to avoid the application of the NLRA in these circumstances by relying on the governmental interest in enforcement of the INA. As the court of appeals put it, "an employer has no right to rely on a 'moral obligation' to report illegal aliens (of which he has been previously oblivious) merely to sanctify an otherwise unjustifiable violation of section 8(a)(3)" (Pet. App. 13a).

5. Affirmance of the judgment below would in no way suggest a broad rule under which a person who reports a violation of the law to responsible governmental officials may be subject to liability for that action. This case is narrowly limited to the reporting of undocumented alien employees to the INS by an employer subject to the NLRA in retaliation for conduct of the employees that is protected by the NLRA. The judgment below is supported by the provisions and policies of the NLRA and INA in this area in which the two Acts intersect and in which Congress must be presumed to have intended that they be applied in a harmonious manner. We do not suggest that reports to the INS from other sources—or by employers,

when not in retaliation for union activities—would be unlawful. There likewise is no occasion to consider whether an employer would violate the NLRA by reporting an employee for a violation of a statute other than the INA in retaliation for employee activities that are protected by the NLRA.

Moreover, we do not suggest that an employer could be held liable in a private civil action brought by an undocumented alien to recover damages for injuries allegedly sustained as a result of the employer's reporting them to INS in retaliation for their union activities. Cf. *In re Quarles*, 158 U.S. 532, 536 (1895). Enforcement of the NLRA vindicates public not private rights, on the basis of charges filed by the General Counsel, in much the same manner as a criminal prosecution. Cf. *Butz* v. *Economou*, 438 U.S. 478, 515 (1978). The fact that an employer may be immune from civil liability for redress of a private wrong does not suggest that he is immune from liability in an action brought by the government to vindicate public rights that are implicated by his conduct. See, *e.g.*, *Briscoe* v. *Lahue*, No. 81-1404 (Mar. 7, 1983), slip op. 14 n.22, 16 n.26, 20-21 n.32; *Imbler* v. *Pachtman*, 424 U.S. 409, 429 (1976); *O'Shea* v. *Littleton*, 414 U.S. 488, 503 (1974). This distinction is significant. Because the General Counsel of the Board has unreviewable discretion to decline to file a complaint (*Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975)), he can screen cases to ensure that only meritorious complaints are filed and, in this manner, protect against harassment of an employer who reports employees to the INS. Moreover, the Board can tailor its remedy to accommodate the policies of the INA more readily than could a court entertaining a private damage action. See *Shepard* v. *NLRB*, *supra*, slip op. 7-8; cf. *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31 (1942).[37]

[37] Petitioners' reliance (Br. 19, 23) on *Southern Steamship* is misplaced. There, the Court held that the Board abused its remedial discretion by ordering the reinstatement with back pay of employees who were fired for engaging in a strike that violated

6. The foregoing discussion also demonstrates that this case is quite different from *Bill Johnson's Restaurant, Inc.* v. *NLRB*, No. 81-2257 (May 31, 1983), upon which petitioners erroneously rely (Br. 18-19). In *Bill Johnson's*, the Court held that an employer's filing of a suit in state court against its employees seeking damages and injunctive relief for libelous statements and injury to its business is not an enjoinable unfair labor practice unless the suit is filed for retaliatory purposes and the suit lacks a reasonable basis. Slip op. 8-11. The Court relied on two factors. First, the Court observed that the right of access to courts for redress of alleged wrongs is an aspect of the First Amendment right to petition the government for redress of grievances, and it concluded that it should be sensitive to First Amendment values in construing the NLRA. Second, the Court noted that in recognition of the compelling interest of the States in maintaining domestic peace, it had construed the NLRA as not preempting the States from providing employers with a civil remedy for tortious conduct during a labor dispute. If the Board were allowed to enjoin a state lawsuit, the Court reasoned, it would follow that the employer would "be totally deprived of a remedy for an actual injury" despite the substantial state interests involved. Slip op. 9-10.

This case is wholly different. The federalism concerns present in *Bill Johnson's* are absent here; this case instead involves the construction of two federal statutes

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a criminal statute barring such conduct. Here, in contrast, the provisions of the INA do not directly regulate the employment relationship between an employer and undocumented aliens, much less prohibit the specific conduct—engaging in union activities—that led petitioners to cause the employees' constructive discharge. Cf. *Carpenters Union* v. *NLRB*, 357 U.S. 93, 111 (1958) (while *Southern Steamship* admonished the Board not to "apply the policies of its statute so single-mindedly as to ignore other equally important congressional objectives," it did not suggest "that the Board should abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes").

which, as we have noted, both support the application of the NLRA to unfair labor practices committed against undocumented aliens. In addition, in the particular circumstances of this case, the countervailing interests arising outside the NLRA do not have the same "compelling" force that the Court in *Bill Johnson's* found to support preservation of a remedy in state court. Slip op. 10. Here, the text and legislative history of the INA in fact attach a somewhat diminished importance to the reporting of undocumented aliens by employers who knowingly hire them. This case also differs from *Bill Johnson's* because the Board there sought to enjoin the prosecution of the suit in state court, which would have frustrated the strong state interest in providing a remedy for tortious conduct. Here, the INS was not prevented from enforcing the immigration laws.

This case also does not involve the "right of access to the Courts for 'redress of alleged wrongs,'" as in *Bill Johnson's*. Slip op. 9, quoting *Peddie Buildings*, 203 N.L.R.B. 265, 272 (1973), enforcement denied on other grounds, 498 F.2d 43 (3d Cir. 1974). Petitioners are in the position of informers to a law enforcement agency, not plaintiffs in a lawsuit in court, and they "ha[d] not suffered a legally-protected injury" (*Bill Johnson's*, *supra*, slip op. 12) at the hands of their undocumented alien employees that they sought to have "redressed" by the INS. The "injury" that prompted petitioners to contact the INS was that sustained as a result of the employees' union activities, for which petitioners have no right to obtain redress. Nor did the status of the undocumented alien employees under the INA injure petitioners, because they kept the aliens on the payroll despite that status. Moreover, the provisions of the INA restricting the entry of aliens are intended for the protection of American workers, not their employers, and, in any event, private persons such as petitioners have no legally protected right to procure enforcement of the immigration laws by the INS. *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). In these respects as well, petitioners, unlike the employer

who brought the suit in state court in *Bill Johnson's*, were not seeking redress for legal wrongs allegedly committed against them.

Finally, this case differs from *Bill Johnson's* because petitioners themselves tolerated and indeed facilitated the aliens' continued presence in the United States in violation of the immigration laws, about which they now claim an unfettered right to report to the INS. There was no suggestion that the employer in *Bill Johnson's* in any way tolerated or facilitated the employees' conduct for which it sought redress in court. In sum, *Bill Johnson's* does not support petitioners claim of a right to avoid their obligations under the NLRA by reporting their employees to the INS.[38]

C. Petitioners' Claim That The Decision Below Should Be Reversed Because It Violates Their First Amendment Rights Is Without Merit

Petitioners assert (Br. 16-19) that their letter to the INS was an exercise of their First Amendment right to petition the government for redress of grievances, which they now contend could not be abridged by deeming their action to be unlawful under the NLRA. The short answer to this argument is that it comes too late. Petitioners did not assert before the Board a First Amendment objection to the finding of an unfair labor practice. Section 10(e)

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[38] This conclusion also is supported by reference to the common law tort of abuse of process, the gist of which is "misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish"; it applies in cases in which the procedure "has been perverted to accomplish an ulterior purpose for which it was not designed." W. Prosser, *Handbook of the Law of Torts* 856 (4th ed. 1971). See also *Restatement (Second) of Torts* § 682 (1977); *Alexander* v. *Unification Church*, 634 F.2d 673, 678 (2d Cir. 1980); *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982). Recognition of that tort in other settings strongly reinforces a construction of the NLRA and INA under which the Board may find it to be an unfair labor practice for an employer to misuse the "process" of reporting aliens to the INS for an end other than enforcement of the INA—*i.e.*, in order to evade its responsibilities under another federal statute, the NLRA.

of the Act provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. 160(e). Petitioners have pointed to no "extraordinary circumstances" excusing their failure to raise the issue before the Board in this case, and the court of appeals therefore was without jurisdiction to consider the constitutional objection. See, *e.g.*, *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311 & n.10 (1979); *Bill Johnson's Restaurants, Inc.* v. *NLRB*, *supra*, slip op. 18 n.15. Moreover, petitioners did not raise their First Amendment argument before the court of appeals or in their petition for a writ of certiorari. For these additional reasons, the issue is not properly raised here. Sup. Ct. R. 21.1(a).

In any event, petitioner's contention that the Board's finding of an unfair labor practice in this case violated their First Amendment rights is without merit. The First Amendment protects the "right of the people peaceably to assemble, and to petition the Government for a redress of grievances." As is suggested by its terms, this guarantee was understood at the time it was adopted principally as protecting political activity to influence the legislature.[39] The Court subsequently has concluded that

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[39] See 1 B. Schwartz, *The Bill of Rights: A Documentary History* 198 (1971) (Declaration of Rights and Grievances of the Congress, 1765, art. XIII); *id.* at 217 (Declaration and Resolves of the First Continental Congress, 1774, Resolve 8); *id.* at 266 (Pennsylvania Declaration of Rights, 1776, art. XVI); *id.* at 277 (Delaware Declaration of Rights, 1776, art. 8); *id.* at 287 (North Carolina Declaration of Rights, 1776, art. XVIII); *id.* at 324 (Vermont Declaration of Rights, 1777, art. XVIII); *id.* at 372-373 (Massachusetts Declarations of Rights, 1780, art. XX); *id.* at 379 (New Hampshire Bill of Rights, 1783, art. XXXII); *id.* (Vol. 2) at 681 (proposed amendment in Massachusetts ratifying convention); *id.* at 735 (proposed amendment 14 in Maryland ratifying convention); *id.* at 842 (proposed amendment 15 in Virginia ratifying convention);

access to courts is an aspect of the right of petition as well. See, *e.g.*, *Bill Johnson's Restaurants, Inc.* v. *NLRB*, *supra*, slip op. 9. This extension of the right finds some support in the text of the Amendment, because a person seeking damages or an injunction in court may be said to be seeking "redress" for a "grievance" or wrong done to him. See also note 39, *supra*. The same is true where a party invokes the quasi-judicial process of an administrative agency. See, *e.g.*, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). But as we have explained above (see pages 38-39, *supra*), petitioners in this case did not invoke an administrative process for redress of any wrongs committed against them. It would be a considerable extension of the right of petition to include within its sweep the absolute immunity petitioners seek for informing a law enforcement agency of a violation of the law, even when done solely for a retaliatory or invidious purpose.[40] In fact, this Court has not treated the reporting of violations to a law enforcement agency

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id. at 913 (proposed amendment in New York ratifying convention); *id.* at 968 (proposed amendment 15 in North Carolina convention); *id.* at 1026, 1089-1095, 1103 (debates in House of Representatives). But see *id.* (Vol. 1) at 73 (Massachusetts Body of Liberties, 1641, art. 12) ("liberties to come to any publique Court, Councel, or Towne meeting, and either by speech or writeing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information"); *id.* at 377 (New Hampshire Bill of Rights, 1783, art. XIV) (every subject entitled to a certain remedy, by recourse to the laws).

[40] Petitioners rely (Br. 17) on a passage in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961), in which the Court stated that the right of the people to inform their representatives in government of their desires with respect to the passage "or enforcement of [the] laws" cannot be made to depend on their intent in doing so. *Noerr*, however, involved political activity that was directly related to the purposes of the First Amendment right to petition. See page 40 and note 39, *supra*. Petitioners' retaliatory reporting of information to the INS was of a quite different nature.

as an aspect of the right of petition. See *In re Quarles*, 158 U.S. 532, 535-536 (1895).[41]

Contrary to petitioners' suggestion (Br. 20), the Court in *Bill Johnson's* did not hold that the First Amendment would preclude the finding of an unfair labor practice based on a retaliatory motive even where access to the courts is involved. The Court simply stated that it should be "sensitive to First Amendment values" in construing the NLRA. Slip op. 9. See also slip op. 3 (Brennan, J., concurring) ("I do not suggest that a constitutional issue surfaces directly in this case"). In our view, the Constitution does *not* bar Congress from attaching adverse consequences to the institution of judicial proceedings when " 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification' " (*Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978), quoting *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962)), even if the proceedings themselves are meritorious. See also *O'Shea* v. *Littleton*, 414 U.S. 488, 503 (1974). One such "arbitrary classification" Congress constitutionally

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[41] In *Quarles*, the Court held that violence committed against a person who informed a federal agency of a violation of the law could be punished by federal law (Rev. Stat. 5508 (1878 ed.), now 18 U.S.C. 242), rather than state law, because that right is secured by the Constitution of the United States. 158 U.S. at 537. The Court did not hold, however, that the right is absolute and that no consequences could be attached to retaliatory or invidious motivation in doing so. To the contrary, the Court indicated that protection of the citizen's ability to inform law enforcement agencies principally serves the " 'necessity of the government,' " not solely the interest of the person reporting. 158 U.S. at 536, quoting *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884). This is consistent with the Court's treatment of the evidentiary privilege for communications by an informer. As the Court stated in *In re Quarles*, that privilege belongs to the government, not the informer personally. 158 U.S. at 536. See also *Roviaro* v. *United States*, 353 U.S. 53, 59 (1957). Accordingly, the Constitution does not require that the individual's interest in reporting a violation of the law be granted an absolute immunity, even where information is reported for a retaliatory purpose in violation of another compelling "necessity of the government," as reflected in the NLRA.

may identify is one based upon the exercise by employees of rights protected by the NLRA, especially since the employees' rights themselves implicate the First Amendment. See, *e.g.*, *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 313 (1979). A fortiori, it does not violate the First Amendment to find an unfair labor practice in the retaliatory reporting of violations to the INS, which does not directly implicate the right of petition.

III. THE BACKPAY AWARD ENTERED IN THIS CASE EFFECTUATES THE POLICIES OF THE NATIONAL LABOR RELATIONS ACT AND DOES NOT CONFLICT WITH THE IMMIGRATION LAWS

Petitioners do not appear to challenge those portions of the Board's remedial order, as modified by the court of appeals, that condition reinstatement of the discriminatees upon their being legally present and permitted by law to be employed in the United States and that, except as discussed hereafter, toll the accrual of backpay for periods during which the discriminatees are unable to satisfy these conditions (Pet. App. 23a, 31a-32a). Their basic challenge is to that portion of the order which provides for a minimum of six months' backpay irrespective of whether the discriminatees actually were absent from the country and unavailable for employment during that period. Contrary to petitioners' contention, this provision effectuates the policies of the NLRA and does not conflict with the immigration laws.

1. Section 10(c) of the NLRA empowers the Board, when it finds that a person has committed an unfair labor practice, to issue an order requiring that person to "cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the] Act" (29 U.S.C. 160(c)). In the case of discriminatory discharges, this Court has recognized that reinstatement and backpay are the only effective means of restoring the situation, "as nearly as possible, to that

which would have obtained but for the illegal discrimination." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941). Restoration of the status quo ante reassures the discriminatees and their fellow employees alike that their employer may not violate the Act with impunity and that they will be made whole for economic injuries suffered for exercising rights under the Act; through such reassurance, "they may be more confident in the exercise of their statutory rights" (*Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 541 (1943)). The backpay order in this case is consistent with these principles.

It is plain beyond serious dispute that each of the five aliens would have continued to work for some period beyond February 18, 1977 but for petitioners' unlawfully motivated report to INS. It is equally plain, therefore, that each of the aliens suffered some loss of earnings as a result of petitioners' unfair labor practices. The six-month minimum backpay award rests on the court of appeals' estimate of the period that the discriminatees would have continued in petitioners' employ if petitioners had not reported them to the INS (Pet. App. 23a, 28a). Petitioners have not shown that this estimate is unreasonable.[42]

Petitioners contend (Br. 27) that the six-month figure is purely speculative and thus results in a windfall to the undocumented aliens. However, the Board, upheld by the courts, consistently has approximated the status quo ante in situations where, because of the unfair labor practice, it is impossible to ascertain it with certainty.[43]

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[42] In 1977, when petitioners' conduct occurred, it was estimated that only one in three undocumented aliens was ever apprehended. See President's Message to Congress Regarding Undocumented Aliens, 13 Pub. Papers 1169 (Aug. 4, 1977). One study showed that for those apprehended, the average pre-arrest length of residence in this country was 2.5 years, that over 36 percent of apprehended aliens had been here for more than three years, and that ten percent had stayed more than six years. *Exploratory Study, supra* note 13, at 81.

[43] See, *e.g.*, *Fisher* v. *NLRB*, 405 F.2d 787, 789-790 (3d Cir. 1968), cert. denied, 396 U.S. 828 (1969); *NLRB* v. *Superior Roofing*

For, as this Court has stated, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946). See also *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 566-567 (1981) ("it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury * * * it has itself inflicted"); *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir.), cert. denied, 304 U.S. 576 (1938).[44]

2. Petitioners' contention (Br. 19-21) that the backpay award is inconsistent with the INA and that the five alien employees were "not entitled to backpay" (*id.* at 26) because of their status under the immigration laws misconceives the nature and purpose of a backpay remedy. The power to order affirmative relief under the NLRA is incidental to the primary purpose of Congress to stop and prevent unfair labor practices. Thus, a reimbursement order issued by the Board "is not a redress for a private wrong." *Virginia Electric & Power Co.* v.

Co., 460 F.2d 1240, 1241 (9th Cir. 1972); *NLRB* v. *Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 572 (5th Cir. 1966); *Leeds & Northrup Co.* v. *NLRB*, 391 F.2d 874, 880 (3d Cir. 1968). Cf. *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 215-217 (1964).

[44] Contrary to petitioners' contention (Br. 26), the six-month minimum backpay award is not inconsistent with the Board's policy of tolling backpay for periods when discriminatees are unavailable for work. Where an employee voluntarily absents himself from the job market by, for example, taking a vacation or refusing to seek employment, the Board will toll backpay liability for that period. See, *e.g.*, *Gary Aircraft Corp.*, 210 N.L.R.B. 555, 557 (1974); *Garrard Convalescent Home, Inc.*, 220 N.L.R.B. 450, 452 (1975). However, where unavailability is due to an illness, injury, or other event that would not have occurred but for the unlawful discharge, backpay liability will not be tolled for that period. *American Mfg. Co. of Texas*, 167 N.L.R.B. 520, 522-523 (1967); *Fabric Mart Draperies*, 182 N.L.R.B. 390 (1970); *Graves Trucking Inc.*, 246 N.L.R.B. 344, 345 (1979), enforced as modified, 692 F.2d 470, 474-477 (7th Cir. 1982); *Moss Planing Mill Co.*, 103 N.L.R.B. 414, enforced, 206 F.2d 557 (4th Cir. 1953).

NLRB, *supra*, 319 U.S. at 543. Such orders "somewhat resemble compensation for private injury, but it must be constantly remembered that [they] are remedies created by statute * * * which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights." *Ibid.* See also *Shepard* v. *NLRB*, No. 81-1627 (Jan. 18, 1983), slip op. 7-8; *Automobile Workers* v. *Russell*, 356 U.S. 634, 642-643 (1958).

Consistent with these principles and the provisions of the INA, we may assume that the aliens themselves could not maintain a private breach-of-contract suit for wages they lost following their return to Mexico. See page 36, *supra*. But it does not follow that the INA bars the Board from awarding backpay to vindicate the *public* rights involved. It was not unlawful under the INA for petitioners to hire the undocumented aliens. Since petitioners took advantage of the immunity granted them by 8 U.S.C. 1324(a) to do so, petitioners cannot be heard to argue that their employment of the aliens was so contrary to public policy that they may not be held liable in any respect for the unlawful constructive discharge of the employees. Indeed, in the circumstances of this case, inability of the Board to provide an effective remedy for petitioners' discrimination against their undocumented alien employees not only would encourage the repetition of similar acts of discrimination in the future; it also would undermine the rights of petitioners' non-alien employees.[45]

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[45] There is no merit to petitioners' contention (Br. 22-23) that the backpay award encourages illegal immigration. Insofar as the six-month minimum backpay award is concerned, the discriminatees are entitled to it irrespective of their presence in the country. Their entitlement to any backpay in addition to that amount is conditioned upon their being lawfully entitled to be present and employed in the United States.

Insofar as petitioners argue more generally that affording undocumented aliens a remedy for wrongs done them while working in this country provides an inducement to unlawful immigration, the argument is untenable. "It cannot be seriously argued that people enter this country illegally so they can recover for an injury

IV. THE COURT OF APPEALS' DECISION REGARDING THE OFFERS OF REINSTATEMENT IS REASONABLE IN THE CIRCUMSTANCES OF THIS CASE

The court of appeals rejected the Board's conclusion that the reinstatement offers petitioners mailed to the discriminatees on March 29, 1977 were deficient because they were not unconditional (Pet. App. 21a-22a). However, the court found the offers deficient on other grounds not reached by the Board, and it modified the Board's order accordingly. The court found the offers inadequate because the 30-day period for acceptance "did not give the discriminatees a reasonable time to consider the offer and make arrangements for legally entering the United States," and held that the offers instead should be kept open for four years (*id.* at 22a). The court further held that the offers were ineffective "because they were not delivered * * * in a manner allowing verification of receipt and they were not written in the discriminatees' native language (Spanish)" (*ibid.*).

Rather than disposing of these issues and enlarging the Board's remedial order in this fashion, the court of appeals should have remanded for the Board to consider the alternative grounds on which the court believed the offers may have been deficient and the form any new offers of reinstatement should take. *NLRB* v. *Food Store Employees*, 417 U.S. 1, 8-9 (1974). Nevertheless, we believe that the court of appeals' decision reasonably effectuates the purposes of the Act in the circumstances of this case. Should the Court disagree, we respectfully submit that the appropriate course would be for the Court to va-

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that will be inflicted upon them later." *Arteaga* v. *Literski*, 83 Wis. 2d 128, 132, 265 N.W. 2d 148, 150 (1978). See also *Peterson* v. *Neme*, 222 Va. 477, 482, 281 S.E. 2d 869, 872 (1981) ("Ordinarily, a person seeks a job because he needs to earn a living, not because he wants to become legally eligible to recover wage losses occasioned by tortious injury. We fail to see how allowing Neme's claim for wages lost on account of Peterson's tort would encourage other illegal aliens to seek employment in this country.").

cate the judgment below in this regard and remand to the Board for consideration of these issues in the first instance.

1. Petitioners' objection (Br. 32-33) to the court of appeals' holding that their reinstatement offers be made in Spanish and in a manner allowing verification of receipt is without merit in this case. The "employer's offer of reinstatement must be reasonably calculated to communicate the offer." *Carruthers Ready Mix, Inc.*, 262 N.L.R.B. No. 90 (July 9, 1982), slip op. 7. See also *Monroe Feed Store*, 122 N.L.R.B 1479, 1480-1481 (1959); *Rutter-Rex Mfg. Co.*, 158 N.L.R.B. 1414, 1424 (1966). Cf. Foreign Sovereign Immunities Act, 28 U.S.C. 1608 (service on a foreign state or its political subdivision, agency or instrumentality shall be made in the official language of the foreign state and "by any form of mail requiring a signed receipt").[46]

2. The court of appeals' requirement that the offers of reinstatement be kept open for four years also is reasonable in the circumstances of this case. The Board has never adopted a fixed rule for determining the appropriate length of time that a reinstatement offer must remain open; instead, it is the Board's policy that "the 'reasonable time' will depend essentially on the situation

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[46] *General Iron Corp.*, 218 N.L.R.B. 770 (1975), aff'd, 93 L.R.R.M. 2336 (2d Cir. 1976) (table), relied on by petitioners (Br. 31), is not to the contrary. There the Board explained (218 N.L.R.B. at 771) that the Spanish speaking employees could reasonably be expected to have a neighbor or family member who could speak English. The Board also noted that its rules did not require service by registered mail, but added that if the employer uses ordinary mail, it "runs the risk" of not being able to prove service should there be any question as to whether the notices were in fact received.

Here, it is not reasonable to assume that the discriminatees, having returned to Mexico, will have such ready access to English-speaking relatives or acquaintances. Moreover, in *General Iron*, as in the normal case, the notices were mailed to the address where the employees could be presumed still to be residing. Here, by contrast, the addresses in Mexico to which the reinstatement letters were sent were not the employees' last known addresses, but addresses at which the employees had lived at some time before coming to Chicago to work for petitioners.

in which an employee finds himself as a result of the discrimination against him." *Fredeman's Calcasieu Locks Shipyard, Inc.*, 208 N.L.R.B. 839 (1974). Accord: *NLRB* v. *Murray Products, Inc.*, 584 F.2d 934, 940 (9th Cir. 1978). And see *Southern Household Products Co.*, 203 N.L.R.B. 881, 882 (1974) (reinstatement offers must allow discriminatees "a reasonable time to consider whether to return to [the employer's] employ, how they were to get there, and what they were likely to face upon arriving there"). In light of the substantial delays that applicants from Mexico encounter in obtaining immigrant visas,[47] it is plain that the 30-day period for which the offers were held open by petitioners would not provide a realistic opportunity for the aliens to return for reinstatement. The four-year period ordered by the court of appeals is reasonable in light of these backlogs.[48]

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[47] We have been informed by the INS that as of September 1983, the backlogs for Mexican nationals to obtain immigrant visas in the six preference categories (8 U.S.C. 1153(a)(1)-(6)) were as follows: First (unmarried children of U.S. citizens), current; Second (spouses and unmarried children of permanent resident aliens), 11 years; Third (professionals and persons of exceptional ability in the sciences or arts), current; Fourth (married children of U.S. citizens), 6½ years; Fifth (siblings of U.S. citizens over age 21), 15 years; Sixth (aliens seeking to enter to perform labor for which there is a shortage of persons in the United States), 2½ years. No visas are available for any nonpreference aliens.

[48] Petitioners argue (Br. 30) that the reinstatement order places an inordinate hardship on their current employees who may be displaced if the discriminatees return to their jobs. It is, however, well settled that an employer whose unfair labor practice causes its employees to leave their jobs must reinstate those employees even if they have been replaced, despite the necessity of dismissing their replacements. See *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 278 (1956); *M.H. Ritzwoller Co.*, 15 N.L.R.B. 15, 29 (1939), enforced in relevant part, 114 F.2d 432, 437 (7th Cir. 1940); *NLRB* v. *Kohler Co.*, 351 F.2d 798, 804-805 (D.C. Cir. 1965); *NLRB* v. *Giannasca*, 119 F.2d 756, 758 (2d Cir. 1941). See also *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 871 (2d Cir.), cert. denied, 304 U.S. 576 (1938).

Petitioners also contend that the four-year period ordered by the court will create undue uncertainty as to whether the discriminatees will return to accept reinstatement. However, we do

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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not believe that the judgment of the court of appeals would prevent petitioners from including in their offers of reinstatement a condition that the discriminatees respond to the letter within a reasonable period of time to indicate their interest in the offer, even though they must be permitted four years within which to be admitted. When petitioners receive those responses, if any, they then can notify their present employees of the situation in order to prevent any unfair surprise. Cf. *Belknap* v. *Hale*, No. 81-1966 (June 30, 1983).

Insofar as petitioners suggest (Br. 30) that such a result would be inequitable here because "illegal aliens" would displace "American workers," they ignore that the discriminatees will be accorded reinstatement only if they obtain proper documentation—a condition that will render them as entitled to employment as any worker currently on petitioners' payroll. Furthermore, the record does not reflect the citizenship or immigration status of petitioners' current workforce.

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